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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

44 LIQUORMART, INC., AND
PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND AND
RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

On Writ of *Certiorari* to the United States
Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND DIRECT MARKETING ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Advertising Federation, the American Association of Advertising Agencies, the Magazine Publishers of America, Inc., and the Direct Marketing Association, by their undersigned attorneys, hereby move the Court for leave, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, to appear as *amici curiae* in the above-captioned proceeding in support of Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. This motion and the accompanying conditionally filed brief is made within the time specified by Rule 37.3.

The written consent of Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc., and of Respondent Rhode Island Liquor Stores Association, accompanies this motion and proposed brief. Due to the recent addition of interested

parties as proposed *amici curiae* and the travel plans of counsel of record for Respondent State of Rhode Island, movants have not yet been able to obtain written consent to their participation from the State. The State has consented to the appearance of other *amici* on behalf of Petitioner, and movants have no reason to believe that counsel of record for the State will object to their participation. Movants will continue to seek the written consent of the State and will file the same with the Court when obtained.

Together, the *amici curiae* described below represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. The precedent set by this case could directly affect the constitutional interests of the *amici* both by curtailing the outlets for truthful commercial speech about lawful products and services and by undermining the financial ability of the amici to engage in fully protected, noncommercial speech. *Amici* are:

- The American Advertising Federation ("AAF"), a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, which represents more than 750 advertising agencies located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.

- The Magazine Publishers of America, Inc. ("MPA"), a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers. Its members represent almost 800 general interest consumer magazines ranging from journals of literature to special interest publications, to multi-million circulation magazines. MPA members provide broad coverage of domestic and international news and publish periodicals covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

- The Direct Marketing Association ("DMA"), a non-profit corporation. DMA is the oldest and largest trade association serving the vast community in direct-to-the-consumer advertising and marketing. Its members are firms engaged in or associated with marketing goods and services through direct response efforts, which include the use of catalogs and other printed materials distributed directly to consumers.

The *amici curiae* have joined together in the filing of this brief to ensure that the right to disseminate, and the public's

right to receive, truthful commercial speech about lawful products and services is provided a full measure of constitutional protection. *Amici* firmly believe that such a rule would be consistent with the original understanding of the First Amendment, which encompassed commercial speech as well as core political speech, and the results of this Court's caselaw. It would also discourage government officials from attempting to manipulate consumer choice through the suppression of speech in an attempt to impose paternalistic governmental judgments of what may be in the best interests of the consumer. Such notions fly in the face of the very purpose of the First Amendment — to nurture and preserve the marketplace of ideas and to allow the individual to make his or her own judgments based upon the entirety of available information.

The proposed brief of *amici curiae* does not duplicate arguments raised by the parties. Rather, it explains the historical and policy reasons for providing truthful commercial speech about lawful products and services with full First Amendment protection. More generally, as commentators have noted, an *amicus* is often in a superior position "to focus the court's attention on the broad implications of various possible rulings." Bruce Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984), *quoted in* Robert L. Stern, et al., *Supreme Court Practice* 570-71 (1986).

The *amici curiae*'s request for leave to participate will not disrupt the briefing schedule, undermine the orderly presentation of argument, delay in any way the resolution of this action, or inject new or unrelated questions into this litigation. The accompanying proposed brief is conditionally submitted to the Court at this time.

WHEREFORE, the American Advertising Federation, the American Association of Advertising Agencies, the Magazine Publishers of America, Inc., and the Direct Marketing Association respectfully request that this Court grant their

motion for leave to file an *amicus curiae* brief in support of Petitioners 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND DIRECT MARKETING ASSOCIATION IN SUPPORT OF PETITIONERS

This brief is respectfully submitted, pursuant to Rule 37 of the Rules of the Court, urging reversal of the decision below of the United States Court of Appeals for the First Circuit on the grounds that the statutes at issue herein impermissibly discriminate against truthful, non-misleading commercial speech concerning lawful products. They therefore violate the Petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

INTEREST OF *AMICI CURIAE*

Amici American Advertising Federation, American Association of Advertising Agencies, Magazine Publishers of America, and Direct Marketing Association collectively represent thousands of advertising agencies, advertisers, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. The precedent set by this case could directly affect the constitutional interests of the *amici* both by curtailing the outlets for truthful commercial speech about lawful products and services and by undermining the financial ability of the amici to engage in fully protected, noncommercial speech.

SUMMARY OF ARGUMENT

Rhode Island's statutory prohibition on truthful, non-misleading alcoholic beverage price advertising cannot be sustained under the standards set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447

U.S. 557 (1980), and its progeny. The State has failed to show that a "reasonable fit" exists between its goal of combatting alcohol abuse and the means it has employed to achieve that goal. Suppressing truthful commercial speech about lawful products in an attempt to stifle competition and thus drive up the cost to consumers is a misguided — and constitutionally impermissible — way of addressing the problem of alcohol abuse.

Although the Court can decide this case under the *Central Hudson* analysis, *amici* respectfully suggest that the Court use this case to give fresh consideration to the basic premises of its treatment of commercial speech. Specifically, *amici* urge that the Court make clear that truthful commercial messages about lawful products and services are entitled to a full measure of constitutional protection. This approach would be: (1) consistent with the outcome in virtually every Supreme Court case involving such speech since it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and (2) fully in accord with the original understanding of the First Amendment, as reflected in its text and surrounding historical circumstances.

Moreover, such a determination would eliminate much of the confusion and inconsistency that now characterizes efforts by the lower courts to implement *Central Hudson*'s "balancing" test. In any event, the decision of the First Circuit should be reversed and the laws in question invalidated.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS DISCRIMINATION AGAINST TRUTHFUL, NONMISLEADING COMMERCIAL MESSAGES

In *Virginia Pharmacy*, this Court properly recognized that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system" and to "the formation of intelligent opinions as to

how that system ought to be regulated." *Id.* at 765. Since that time, however, the Court has adopted and applied the *Central Hudson* "balancing" test. That test goes beyond the questions of whether a commercial message is truthful and non-misleading and whether it concerns a lawful product or service. The *Central Hudson* test further seeks to assess whether the asserted governmental interest justifying the regulation is "substantial"; whether the regulation "directly and materially advances" that interest; and whether it does so "in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Business & Professional Regulation,* 114 S. Ct. 2084, 2088 (1994).

Fortunately, in the decisions of the Court to date, this test has led to **results** that are generally consistent with a grant of full First Amendment protection to truthful advertising of lawful products and services. Accordingly, the approach advocated in this brief would not require substantial modification of previously approved governmental policies. More importantly, however, the proposed analysis would avoid the danger of unlawful censorship that will exist so long as commercial messages are formally subjected to a reduced level of constitutional protection, and thus suppression of speech remains a potential tool for policymakers seeking to influence consumer choice. In addition, the adoption of a categorical approach would eliminate much of the confusion and inconsistency that has marked efforts by the lower courts to implement the *Central Hudson* "balancing" test.

A. The Court's Jurisprudence Is Largely in Accord With the View That Factual, Non-Misleading Commercial Messages Are Fully Protected by the First Amendment.

This Court first made clear that "purely commercial advertising" is entitled to constitutional protection in *Virginia Pharmacy*, 425 U.S. at 755. *Virginia Pharmacy* established that a state ban on advertising the prices of prescription drugs

violated the First Amendment. In that case, the Court rejected the notion that a State could seek to advance its admittedly "strong interest" in maintaining professionalism among pharmacists by silencing the free flow of truthful product information. Instead, the Court endorsed the "alternative to this highly paternalistic approach," and properly "assume[d] that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770. The Court continued: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.*

Matters have now come full circle. As in *Virginia Pharmacy*, the Court must once again decide whether a sweeping ban on the dissemination of truthful price information regarding a lawful product can survive First Amendment scrutiny. *Amici* urge the Court to reject the paternalistic notion that the State may manipulate the purchasing decisions of consumers by denying them access to truthful product information, commercial or otherwise. Rather, the Court should adhere to its result in the recently decided *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), which invalidated a federal statute prohibiting the disclosure of "truthful, verifiable, and nonmisleading factual information about alcohol content on . . . beer labels." *Id.* at 1590. In the process, the Court should state expressly that truthful commercial messages regarding legal products and services may not be banned or regulated merely because of their commercial nature.

1. *The outcome of virtually all of the Court's decisions since* Virginia Pharmacy *has been consistent with the principle that truthful commercial messages about lawful products are entitled to a full measure of constitutional protection.*

Since *Virginia Pharmacy*, this Court's commercial speech decisions have consistently rejected the notion that the government may suppress access to factual, readily verifiable information about legal products and services "for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens." *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2710 (1993) (Stevens, J., dissenting).[1]

The Court traditionally has upheld restrictions on advertising which (1) concerned products and services that were not unambiguously lawful, or (2) ostensibly prevented

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[1] *See also, e.g., City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (regulation restricting distribution of truthful commercial handbills in order to preserve "safety and esthetics" violates First Amendment); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990) (truthful factual statement that attorney is certified as "specialist" by National Board of Trial Advocacy protected by First Amendment); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (truthful, nondeceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *In re R.M.J.*, 455 U.S. 191 (1982) (rule limiting dissemination of truthful legal advertising violated First Amendment); *Central Hudson Gas & Elec. Corp. v. Public Services Comm'n*, 447 U.S. 557 (1980) (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (truthful attorney advertising constitutionally protected); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (law restricting advertising of contraceptives violated First Amendment since it did more than limit misleading or deceptive speech); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (editor could not be prosecuted for running non-deceptive advertisement for a legal service).

consumers from being misled. *Edge* falls into the first category of cases. In that case, the Court upheld federal legislation that banned broadcasts of lottery advertising by radio stations in nonlottery states, but which allowed such advertisements to be broadcast by stations located in states that had state-supported lotteries. The Court found the restrictions on commercial speech justified by "the substantial federal interest in supporting North Carolina's laws making lotteries illegal." *Id.* at 2705.

Friedman v. Rogers, 440 U.S. 1 (1979), is an example of the second exception. There the Court upheld a statute banning the use of trade names by optometric offices on the ground that "there is a significant possibility that trade names will be used to mislead the public." *Id.* at 13. And in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626 (1985), the Court approved a requirement that attorneys inform the public that they may be responsible for costs (but not legal fees) if they hire a lawyer on a contingent fee basis: "[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted).[2]

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[2] The ban on in-person solicitation by lawyers upheld in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), was similarly found to be constitutional because it prevented attorneys from taking commercial advantage of prospective clients who may be misled or deceived in the proposed transaction. The thirty-day prohibition on targeted direct mail solicitation of accident victims and their relatives upheld in *Florida Bar v. Went For It, Inc.*, No. 94-226 (U.S. June 21, 1995), is also not a significant departure from a rule providing full protection to truthful commercial speech on lawful products. In that case, the Court held that the restriction directly advanced the state's interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers" and the collateral impact of such intrusions on the reputation of the legal profession. *Id.*, slip op. at 5-6. As a practical matter, the ability of the state to protect against lawyers' "intru[ding] upon the special

These two exceptions reflect "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech," that the Court noted in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). That distinction, embedded in the common law, permits broader regulation of the content of advertising about lawful products and services to ensure its veracity. *See infra* pages 22-24. Such regulations, however, are subject to review by the courts to ensure that the government is not using its police power to define commercial fraud and misrepresentation as a pretext to punish or censor truthful and lawful (protected) communications.[3]

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), exemplifies this approach. There, the Court held unconstitutional a statute prohibiting the mailing of unsolicited advertisements for contraceptives. It recognized that "regulation of commercial speech based on content is less problematic . . . . [i]n light of the greater potential for deception or confusion in the context of certain advertising messages." *Id.* at 65. There, however, the asserted governmental interest was not to protect the recipient from deception. Rather, as here, the government sought to address the perceived ill effects flowing from the receipt of truthful information. The Court held that the messages were protected.

(..continued)
vulnerability and private grief of victims or their families," *Id.* at 6 (internal quotations omitted), is not far removed from its recognized ability to protect citizens against fraud or overreaching by members of the legal profession. The majority opinion specifically distinguished the Florida regulation from "situations in which the Government is primarily motivated by paternalism." *Id.* at 13 n.2.

[3] For the purposes of this brief, we assume *arguendo* that the Court correctly upheld restrictions on commercial speech asserted to be false or misleading. *Amici* do not necessarily agree, however, that the commercial communications at issue in each of these cases can fairly be characterized as having been false or misleading.

This Court similarly rejected a state effort to remediate asserted societal problems through the suppression of truthful commercial speech in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In *Linmark*, the Court unanimously overturned a municipal ordinance forbidding the posting of real estate "For Sale" signs, adopted to stem the perceived flight of white homeowners from a racially integrated community. As in *Virginia Pharmacy*, this Court held that "we were unpersuaded that the law was necessary to achieve this objective, and . . . that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." *Id.* at 95.

Indeed, this Court's decisions have consistently recognized the value of truthful commercial speech. Thus, in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), the Court struck down a state ban on in-person solicitation by certified public accountants, reaffirming the importance of free communication of truthful, nonmisleading commercial information:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Id. at 1798.

The Court should adhere to this "general rule" in the case at bar and allow "the speaker and the audience" to assess the value of price information about alcohol products.

2. *The* Central Hudson *"balancing test" is susceptible to decisions inadequately protective of commercial messages; it also causes confusion among the lower courts.*

The Court's rhetoric, however, has not matched its actions

in providing full First Amendment protection to truthful commercial speech. Instead, in explaining its decisions, the Court has frequently reiterated a broad assertion that "the Constitution accords less protection to commercial speech than to other constitutionally guaranteed forms of expression," *Bolger*, 463 U.S. at 64-65, and then applied the factors set forth in the *Central Hudson* test.

As shown at length below, there is no textual or historical justification for the *Central Hudson* test itself. *See* pp. 12-24 *infra*. This Court was correct in *Virginia Pharmacy* when it extended First Amendment protection to "concededly truthful information about entirely lawful activity." 425 U.S. at 773. The *Central Hudson* test, however, has spurred government actions that are inconsistent with the spirit of *Virginia Pharmacy* itself. This inconsistency is most clearly revealed where, as here, the government asserts "that consumers should be misled or uninformed for their own protection." *Rubin*, 115 S. Ct. at 1597 (Stevens, J., concurring).

Most significantly, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), illustrates the perils of utilizing a balancing test to determine the constitutional protection due commercial speech. In *Posadas*, the Court upheld Puerto Rico's restriction on casino gambling advertising directed to residents, which was adopted to circumscribe the perceived ill effects of such gambling on the island's natives. Applying *Central Hudson*, the Court concluded that Puerto Rico's "substantial" interest in "reduc[ing] . . . demand for casino gambling by the residents of Puerto Rico" was "directly advance[d]" by limiting the availability of such advertising to its inhabitants. *Id.* at 341.[4]

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[4] The Court attempted to buttress its opinion in Posadas by making the widely criticized argument that the "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" *Id.* at 345-46. *See, e.g.* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev.

A major flaw in this analysis is that it can be employed by proponents of regulation in an effort to justify restrictions on a wide variety of commercial messages. To illustrate, numerous products — from foods high in fat, sugar, salt, or nitrates to large-engine cars — have been accused of creating dangers to the public welfare and, arguably, could be banned by Congress or state legislatures. Accordingly, the state's interest in discouraging the use (or abuse) of any of these products could be characterized by supporters of regulation as "substantial."

Furthermore, as in *Posadas*, proponents of regulation can be expected to contend that a ban on advertising related to such products would "directly advance" the state's interest in dissuading consumers from abusing them. But this conclusion flies in the face of twenty-plus years of this Court's caselaw repeatedly invalidating restrictions on truthful advertising, from the price advertising ban in *Virginia Pharmacy* to the ban on alcohol content information in *Rubin*.[5]

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627 (1990) (criticizing this rationale). As evidenced by its more recent decisions on commercial speech such as *Rubin*, 115 S. Ct. 1585, this Court has plainly rejected such a broad interpretation of *Posadas*. In *Rubin*, the Court rebuffed the Government's assertion that "legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." *Id* at 1589 n.2. *See also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988) ("[T]hat [greater-includes-the-lesser] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions. . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

[5] See cases discussed *supra* at pp. 5-8. Although *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), employs the *Central Hudson* analysis as well, it is best understood — and perhaps should have been analyzed — as a right of access case involving a rule of general applicability affecting many business

A second flaw in the *Posadas* analysis (and the *Central Hudson* test) is that it has caused confusion among the lower courts.[6] Such inconsistencies are an inevitable consequence of asking individual judges to assess the "substantiality" of an asserted state interest and weigh it against the degree of impingement on otherwise protected speech. The dramatic difference in the burden placed upon the State to justify its price advertising ban by the district court and the Court of Appeals in this matter exemplifies the contradictory outcomes that result from application of the *Central Hudson* test.

Balancing tests, by their very nature, tend to promote unprincipled decision-making, confusion, and judicial inconsistency. As such, although "we will have . . . balancing modes of analysis with us forever[,] . . . those modes of analysis should be avoided where possible." Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989). Balancing tests such as the *Central Hudson*

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activities in addition to commercial speech. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). Unlike the statutes at issue herein, the general ban on most commercial activities on campuses at issue in *SUNY v. Fox* did not directly discriminate against certain forms of speech. Rather, its broad purpose was to keep certain businesses out of university campus dormitories.

[6] *Compare, e.g., National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir.), *cert. denied*, 498 U.S. 852 (1990) (ordinances prohibiting maintenance of off-premises signs unconstitutional); *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989) (ordinance prohibiting maintenance of off-premises sign boards unconstitutional) *with Penn Advertising of Baltimore, Inc. v. Mayor & City Council*, 862 F. Supp. 1402 (D. Md. 1994) (ordinance prohibiting outdoor advertising of tobacco products constitutional); *Anheuser-Busch v. Mayor & City Council*, 855 F. Supp. 811 (D. Md. 1994) (ordinance prohibiting off-premises alcohol advertising signs constitutional).

analysis too easily permit judges to "mistake their own predilections for the law." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989).

Especially when dealing with First Amendment freedoms, "the use of ... traditional legal categories is preferable to the sort of ad hoc balancing that the Court" performs under the *Central Hudson* analysis. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring); *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2048 (1994) (O'Connor, J., concurring) (in First Amendment area, "fairly precise rules are better than more discretionary and more subjective balancing tests"). The problems inherent in the *Central Hudson* balancing test could largely be avoided if truthful commercial messages concerning lawful products or services were accorded the same constitutional protection (and subject to the same regulation) as other forms of speech.

B. The Original Understanding of the First Amendment, When Read with the Common Law of 1791, Confirms That Truthful Commercial Messages Are Entitled to Full First Amendment Protection.

The conclusion that truthful messages about lawful products or services are entitled to full protection is also consistent with the original meaning of the First Amendment.[7] The Press Clause, when read against the historical

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[7] Whether or not one believes that the text and history of the Constitution determine the outcome of a particular case, the original understanding of the Constitution's terms is without question relevant to any attempt to interpret the Constitution. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) (Thomas, J., concurring) ("[w]e should seek the original understanding when we interpret the Speech and Press Clauses"); *Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

background of 1791, confirms that, while government may limit commercial messages concerning lawful products to avoid potentially false or misleading claims, such speech is not subject to a reduced level of constitutional protection in other respects.

"[T]he true meaning [of the freedom of the press] as understood *by the nation* at the time of its ratification" prohibits discrimination against commercial communications merely because they are commercial. Letter of James Madison to John G. Jackson (Dec. 21, 1821) *reprinted in 9 Writings of James Madison* 70, 74 (Galliard Hunt ed., 1819-36) (emphasis in original). Indeed, the development of the concept of a free press and of a commercial, advertising-driven press were inextricably linked. Verner W. Crane, *Benjamin Franklin's Letters to the Press, 1758-1775* xvi (1950) ("It was a commercial age, and it produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would simply never have occurred to colonial Americans. At the same time, it is clear that the common law rules limiting misrepresentation survived the adoption of the Bill of Rights. The First Amendment permits the regulation of commercial messages concerning lawful products and services only to ensure that they are truthful and not misleading.

The strongest support for the view that truthful, non-misleading speech about lawful matters is entitled to a full measure of constitutional protection is the text of the Press Clause itself, which does not distinguish between advertisements and other types of messages. Absent specific evidence to the contrary, then, it should be presumed that the original meaning of "the freedom . . . of the press" encompasses all elements of the press, including advertising. Indeed, there is much historical evidence demonstrating that the "press" which the Framers wanted to remain forever free included commercial advertisements.

Certainly, colonial Americans did not distinguish between the types of messages warranting protection from governmental interference. As one contributor writing under the pseudonym "Philalethes" declared in Boston's *Herald of Freedom* in 1788, Americans "are nurtured in the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on *every* subject, constitutes the dignified character of Americans." *Boston Herald of Freedom*, Sept. 15, 1788 (emphasis added).[8]

It is clear, moreover, that the "press" which the Framers specifically sought to protect encompassed communication concerning commercial matters. As Richard Henry Lee of Virginia, perhaps the leading Anti-Federalist, said in his demand for a bill of rights, "a free press is the channel of communication to *mercantile* and public affairs. . . ." Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added).[9]

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[8] *Quoted in* Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 19 (1988). When *The New Hampshire Gazette* was launched in 1756, its publisher said that the paper would "contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any Respect." *New Hampshire Gazette*, Oct. 7, 1756, *quoted in* Smith, *supra*, at 49 (emphasis added). True to its word, the Gazette, like the other newspapers of its day, carried everything from price lists to political philosophy.

[9] *Reprinted in Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy ed., 1966). Among the goals of the first attempted colonial newspaper in 1690 was the promotion of "Business and Negotiations." *PUBLICK OCCURRENCES, Both Foreign and Domestick*, Sept. 25, 1690, quoted in Frank Presbrey, *The History and Development of Advertising* 119 (1929). This newspaper was suppressed by governmental authorities

1. *Advertising was an integral part of the "press" in colonial America.*

The inextricable link between editorial and advertising content in the press of the Eighteenth Century illustrates the fallacy of differentiating for constitutional purposes between commercial and non-commercial speech. For much of that era, newspapers did not generally use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as equally of interest to readers and treated the same. Kent R. Middleton, *Commercial Speech in the Eighteenth Century, printed in Newsletters to Newspapers: Eighteenth-Century Journalism* 281 (Donovan H. Bond & W. Reynolds McLeod eds., 1977). The standard colonial newspaper was almost half-filled with local advertising. Lawrence C. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine's *New-York Mercury* was 70% advertising, and 55% of the *Royal Gazette* consisted of commercial matter. Alfred M. Lee, *The Daily Newspaper in America* 32 (1937).

The first daily newspaper in the United States was established in 1784 as a result of pressure for advertising space. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with ads. Frank Presbrey, *The History and Development of Advertising* 161 (1929). As with several other newspapers of the period, the name of this paper (as well as that of New York's first daily, *The New York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity.[10] The front

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after its first issue.

[10] *See also* Presbrey, *supra*, at 154 ("Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the

pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising. Frank L. Mott, *American Journalism A History: 1690-1960* 157 (1963) ("Most dailies in these years used page one for advertising, sometimes saving only one column of it for reading matter."); *see also* James P. Wood, *The Story of Advertising* 85 (1958).

The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." Middleton, *supra*, at 277. ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services."). Often newspapers simply carried long lists of general merchandise available for purchase. Mott, *supra*, at 58. Without these ads, the vibrant colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." *Id.* at 56. The distinction between commercial and non-commercial speech would simply have been alien to the Framers' generation.

2. *The colonial conception of a "free press" included advertising.*

Given the prevalence of advertising in colonial America, it is not surprising that the very idea of a free press evolved in close connection with the development of advertising.[11] In

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foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.").

[11] Although the first regularly published American weekly newspaper, the *Boston News-Letter* of May 1-8, 1704, also contained the first paid advertisements, it took about fifteen years for Benjamin Franklin and his brother James to come "into journalism and sow[ ] the seed of a free press and an expansion of advertising." Presbrey, *supra*, at 131; see also Frank L. Mott, *American Journalism A History: 1690-*

fact, one of the best-known statements in defense of a free press was written in response to an attack on an advertisement printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The notice simply "propose[d] a commercial transaction," *Virginia Pharmacy*, 425 U.S. at 760, by seeking additional freight and passengers for the captain's latest voyage. At the bottom of the ad was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." Benjamin Franklin, *An Apology for Printers*, Pa. Gazette June 10, 1731, *reprinted in* 2 *Writings of Benjamin Franklin*, 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his "Apology for Printers" which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." Stephen Botein, *Printers and the American Revolution* in *The Press and the American Revolution* 20 (Bernard Bailyn & John B. Hench eds., 1980). Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin's "Apology" contended that "Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick."[12] This in-

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1960 11 (1963).

[12] This echoed the sentiment in the libertarian *Cato's Letters*, published from 1720-1724 and widely circulated in the colonies, that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." John Trenchard & Thomas Gordon, 3 *Cato's Letters* 295 (1733). These letters were "the most popular, quotable, esteemed source of political ideas in the colonial period." Clinton L. Rossiter, *Seedtime of the Republic* 141 (1953). *Compare Abrams v. United States*, 250 U.S. 616, 630 (1919) ("the best test of truth is the power of the thought to get itself accepted

cident illustrates that, at least to Franklin, the "Opinions" stated even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of commercial speech.

One of the major precipitating events of the American Revolution also involved a defense of advertisements. The Stamp Act of 1765 taxed each newspaper — and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. John Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. Arthur M. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966). The repeal of the Stamp Act of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

Advertisements were not necessary to the press simply because the revenue they generated was required for newspapers to exist; they were thought to have independent value in educating and informing the reading public. As the prominent printer-historian Isaiah Thomas, editor of an ardently pro-Revolutionary newspaper, wrote:

> [Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example,

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in the competition of the market") (Holmes, J., dissenting).

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History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* Daniel Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958).

3. *The Framers' political philosophy, which equated liberty and property, did not distinguish between commercial and noncommercial messages.*

The inextricable link between commercial and other speech reflects the Framers' political philosophy, which generally equated liberty and property rights. As one newspaper commentator put it, "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the enjoyment of the other." *Boston Gazette*, Feb. 22, 1768, *quoted in* Clinton L. Rossiter, *Seedtime of the Republic* 379 (1953). This philosophy was based on that of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave, or depending upon the will of any other man." John Locke, *Second Treatise on Government* ch. 2, § 4 (1790).

Proceeding from Locke's thesis, Cato wrote:

> By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, so far as it hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys. . .

John Trenchard & Thomas Gordon 2 *Cato's Letters* 244-45 (1733).

The generation of the Framers firmly believed in the tie

between liberty and property. For example, George Mason's Virginia Declaration of Rights stated that among the natural rights of man was "the Enjoyment of Life and Liberty, *with the Means of acquiring and possessing Property*, and pursuing Happiness and Safety." Va. Declaration of Rights § 1, *reprinted in* Helen H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added).

Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." 1 *Cato's Letters* 95-103 (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, Feb. 4, 1720).[13]

Distinguishing between the value of commercial and non-commercial speech, particularly for the purposes of making it easier to censor the former, thus would never have occurred to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. For example, echoing Locke and Cato, James Madison wrote:

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[13] Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Smith, *supra*, at 25. In fact, Cato's Essay on Free Speech, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. Cato's Essay contended that "Freedom of Speech is the Great Bulwark of Liberty; they prosper and die together." Cato's Letters No. 15, *quoted in* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 (1983). Madison lifted Cato's phrase for his original draft of the First Amendment, which provided that "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty shall remain inviolable." 1 *Annals of Congress* 434 (1789), *reprinted in 5 The Founders' Constitution* 128 (Philip B. Kurland & Ralph Lerner eds., 1987).

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have right; and *which leaves to every one else the like advantage.*
>
> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, man has a property in his opinions and the free communication of them . . . .

James Madison, *Property, The National Gazette* (Mar. 27, 1792), *reprinted in* James Madison, 14 *Papers of James Madison* 266 (Robert A. Rutland & Thomas A. Mason eds., 1983) (emphasis in original). Madison explicitly equated liberty and property, stating that "as a man is said to have a right to his property, he may be equally said to have a property in his rights . . . ." *Id.* In Madison's view, the primary role of government was to guarantee these rights to the individual:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own.*

Id. (emphasis in original).

Given this equation of liberty and free speech as forms of property, eighteenth-century printers who published advertising-laden newspapers believed that they were exercising the natural right to control the property. In fact, much of the opposition to the British Stamp Act of 1765 and the taxes it imposed on the press — including taxes on advertising — was based on their perceived offense to property rights. *See* Middleton, *supra*, at 280-81.

In keeping with this recognition that advertising was an inextricable part of the press whose freedom the Framers sought to guarantee, the text of the First Amendment draws no

distinction between the commercial and noncommercial aspects of the press. The purpose of the Press Clause, as Madison said when the First Amendment was reported out of the House select committee, was to expressly declare "the liberty of the press . . . to be beyond the reach of government." 1 *Annals of Congress* 738 (1789), *reprinted in* 5 *The Founders' Constitution* 129 (Philip B. Kurland & Ralph Lerner eds., 1987). There is simply no evidence that the First Amendment places "beyond the reach of government" just that part of it which contained political or other noncommercial speech.

4. *The First Amendment did not displace the common law restricting false or misleading speech, which is not protected.*

That the "freedom of the press" includes advertisements does not mean, however, that false or misleading commercial speech is, or ever was, entitled to First Amendment protection. *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979). The First Amendment was adopted against the background of a venerable common law tradition prohibiting commercial misrepresentation. Justice Story addressed that "old head of equity," the law of misrepresentation, in great detail. *See* Joseph Story, *Equity Jurisprudence* § 191 (1836). He described the basic rule as:

> Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage; in every sense there is a positive fraud in the truest sense of the terms; there is an evil act with evil intent . . . And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions.

Story, *supra*, § 192; *see* William F. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of

action of deceit from mid-fourteenth century).[14]

Thus, the Court has correctly noted that there is a "distinction between commercial and noncommercial speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981). Properly understood, however, that distinction should simply be as follows: the veracity of commercial speech may be policed, whereas the government's ability to regulate "false" or misleading political speech is far more constrained.[15] This distinction avoids the "dilution" which this Court has said would be "invited" were "a parity of constitutional protection for commercial and noncommercial

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[14] Similarly, the Court has consistently held that advertising promoting an unlawful product or service is unprotected. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). This comports with the common law, which considered it a criminal offense to "procure, counsel, or command another to commit a crime." William Blackstone, 4 *Commentaries on the Laws of England* 36 (1769) (defining an accessory before the fact); *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases.").

[15] As Justice Stevens recently noted, "[i]n the commercial context, government is not only permitted to prohibit misleading speech that would be protected in other contexts, but it often requires affirmative disclosures that the speaker might not make voluntarily." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1594 (1995) (Stevens, J., concurring) (citations omitted). *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("[u]nder the First Amendment there is no such thing as a false idea"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding unconstitutional "forced speech" with respect to political speech). *But see Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (false and defamatory speech may be punished because libelous). Courts remain obligated, however, to review government regulation of commercial speech to ensure that they genuinely target misleading messages and that the government is not using its power to prevent fraud as a pretext to censor truthful communications about lawful products.

speech alike" required. *Ohralik*, 436 U.S. at 456.

Certainly, the First Amendment was not intended to free advertisers to misrepresent their wares or to displace the common law regulating commercial transactions. Thus, in defining misrepresentation, the legislature is carrying forward a common-law tradition which the First Amendment did not displace. The First Amendment does, however, forbid the government from restricting commercial messages for illegitimate ends under the pretext of promoting a vague and generalized concept of "fairness" in every commercial transaction. *See generally Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). Nor would it permit an outright ban on all commercial communications on the grounds that they are somehow inherently misleading. *Cf. Virginia Pharmacy*, 425 U.S. at 766-69. Finally, as demonstrated below, it certainly would prohibit laws which discriminate against truthful commercial messages about a particular legal product or service the use of which the Government seeks to suppress.

II. BY BANNING DISSEMINATION OF FACTUAL INFORMATION MERELY BECAUSE IT IS COMMERCIAL IN CONTEXT, THE RHODE ISLAND STATUTES VIOLATE THE FIRST AMENDMENT.

Rhode Island's ban on price advertising is unconstitutional whether it is assessed under the strict scrutiny accorded to restrictions on fully protected speech or under the Court's *Central Hudson* test.

A. The Rhode Island Ban on Price Information is a Content-Based Restriction Prohibited by the First Amendment.

Rhode Island's statutory prohibition on pricing information is not based on the contention that the prohibited "expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*,

447 U.S. at 566 n.9. Accordingly, the ordinance at issue should be subject to the same level of scrutiny as are regulations banning non-commercial speech. Employing this standard, the ordinance fails because it rests on a content-based distinction that is not narrowly tailored to directly achieve a compelling state interest. *See, e.g., Simon & Schuster*, 112 S. Ct. at 509.

Rhode Island's statutes, on their face, restrict the distribution of certain forms of information solely because they relate to alcoholic beverages. *See Virginia Pharmacy*, 425 U.S. at 771 (prescription drug price advertising ban "singles out speech of a particular content and seeks to prevent its dissemination completely"). "Such official scrutiny of the content of publications as the basis for [an advertising ban] is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987). Rhode Island could not show that it has chosen the least restrictive means possible to achieve a compelling state interest.

The harmful implications of empowering the government to make content-based determinations of the kind required by the Rhode Island ordinance are easily demonstrated. It is one thing to "impos[e] on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful" in the context of commercial claims. *Zauderer*, 471 U.S. at 646. As demonstrated above, there is a common-law tradition supporting the undertaking of this task by the State. It is quite another, however, to permit government officials to prohibit truthful, nonmisleading commercial speech in order to influence individual decision-making about legal products and services. The latter "highly paternalistic approach" is incompatible with the traditions of a free people.

B. Even Under This Court's *Central Hudson* Analysis, the Rhode Island Restrictions Must Fail.

As the district court held, and as the briefs of Petitioners and their supporting *amici* demonstrate, the State has not shown that the statutes at issue satisfy the requirements of the *Central Hudson* test. This Court has repeatedly reaffirmed that "the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.'" *Rubin*, 115 S. Ct. at 1592 (*quoting Edenfield v. Fane*, 113 S. Ct. at 1798). This burden "is not slight." *Ibanez*, 114 S. Ct. at 2089. To prevail, the State "must demonstrate that the harms it recites are *real* and that its restriction *will in fact alleviate them to a material degree.*" *Edenfield*, 113 S. Ct. at 1795 (emphasis added). As a result, the State must prove both that price advertising causes increased alcohol consumption and that a ban on price advertising substantially reduces such consumption.

After reviewing the evidence presented by both parties, the district court properly held that the State had failed to meet this burden. *44 Liquormart, Inc. v. Racine*, 829 F. Supp. 543 (D.R.I. 1993), *rev'd*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995). Fully analyzing all of the evidence presented, including competing expert testimony, that court found that "Rhode Island's off-premises liquor price advertising ban has no significant impact on levels of alcohol consumption in Rhode Island." *Id.* at 549.

In addition, the district court was presented with unrebutted evidence of the price advertising ban's inefficacy. Despite the State's suppression of price advertising for over thirty-four years, Rhode Island remains in the top thirty percent of states in per-capita alcohol consumption. *Id.* at 546. Further, despite steady increases in overall alcohol advertising over the past fifteen years, alcohol consumption has actually decreased. *Id.*

In reversing the district court, the First Circuit failed to hold the State to the appropriate burden of proof. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995). Instead, perceiving "inherent merit" in the State's position, the First Circuit improperly deferred to the legislature's assumption that barring price advertising would diminish alcohol sales, and implicitly presumed that a general reduction in sales would decrease alcohol abuse. *Id.* at 7-8. Finally, despite the record evidence, the Court found that, "in the absence of any affirmative contradiction to rely on," the district court was bound to affirm the State's ban as reasonable. *Id.* at 8.[16]

This misallocation of the burden of proof completely ignores this Court's decision in *Edenfield*, 113 S. Ct. at 1800.[17] To justify its prohibitions on Petitioners' speech, the State must do more than rely on intuitive suppositions

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[16] The First Circuit further mistakenly assumed that "[a]dvertising must be generally productive, or so much money would not be spent on it." *Id.* at 7. This ignores the fact that most businesses selling "mature products" such as beverage alcohol advertise and compete based on price in order to increase market share, not overall consumption. *See 44 Liquormart*, 829 F. Supp. at 549. Advertising increases an individual manufacturer's profit margin by enabling the manufacturer to gain customers from competitors and to retain customers it already has by promoting brand loyalty. M.J. Waterson, *Advertising Brands & Markets* 19 (1988). A shift of just one market share point (that is, of one percent of current alcoholic beverage consumers) can increase sales by about $500 million. *See* Steven L. Borsby, et al., *Brewing: A Story of Economic Impact* 5 (1994).

[17] The First Circuit's undue deference to the assumptions underlying the statute also conflicts with this Court's frequent admonition that, where First Amendment values are at stake, the judiciary "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumer Union, Inc.* 466 U.S. 485, 499 (1984). *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, No. 94-749, slip op. at 7-8 (U.S. June 19, 1995).

regarding consumer behavior and the paternalistic notion that Rhode Island citizens will drink to excess when confronted with the knowledge that a particular retailer is holding a sale on beer. Given the lack of record evidence demonstrating either that alcohol price advertising is directly linked to the overconsumption of alcohol or that the State's price ban has contributed to any reduction in alcohol abuse, the State has failed to carry its burden of proving any "direct and material" advancement of its goals.

By ignoring the requirements set out in *Edenfield*, the First Circuit condones future indirect attacks on constitutionally protected rights. For example, as one expert in this case noted, Washington, D.C.'s high per capita alcohol consumption rate is attributable in part to the amount of lobbying activity that occurs in the nation's capital, an activity that frequently involves alcoholic beverage consumption. Deposition of David J. Pittman at 14:10-16 (Nov. 10, 1992). Upholding the price ban at issue would be akin to upholding a law prohibiting lobbying to reduce alcohol abuse. Neither ban can be said to advance the government's interest in a "direct and material" way or to avoid improper circumscription of constitutionally protected rights.

Barring price advertising on the theory that it will result in higher prices, and thus less abuse, is not a constitutionally permissible way of achieving the legitimate goal of promoting responsible alcohol consumption. It is a palpably indirect way of proceeding where, as noted by the district court, there are many obvious — and far more direct — alternatives to a restriction on commercial speech. *See Discovery Network*, 113 S. Ct. at 1510 n.13.

CONCLUSION

The principle at stake in this case is whether truthful commercial messages about lawful products and services may be treated entirely differently from noncommercial speech

merely on the basis of their commercial content. If such discrimination is permitted, then government officials may in the future assert supposedly "substantial" interests concerning health, safety, and other matters in a way that threatens to deny consumers access to information they want and need. This threat of censorship is too great, and the "benefits" to be gained from such serious restrictions on truthful communications are too attenuated, to justify adopting such a rule.

This Court should therefore strike down the Rhode Island statutes at issue, reverse the decision of the First Circuit, and confirm that truthful, non-misleading commercial messages concerning lawful products and services are entitled to the full protection of the First Amendment.

Respectfully submitted,

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